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CENTRAL CONTRA COSTA SANITARY DISTRICT

BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Central Contra Costa Sanitary District's Petition for review of Action and Failure to Act by the California Regional Water Quality Control Board, San Francisco Bay Region, in Adopting Order No. R2-2007-008 and Waste Discharge Requirements for the Central Contra Costa Sanitary District	**PETITION FOR REVIEW; PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION (Wat. Code § 13320)**

Petitioner Central Contra Costa Sanitary District ("District"), in accordance with Water Code section 13320, hereby petitions the State Water Resources Control Board ("State Board") for review of Order No. R2-2007-008 of the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Board"), reissuing National Pollution Discharge Elimination System ("NPDES") Permit No. CA0037648 for the District (the "Permit"). A copy of the Permit is attached to this Petition as Exhibit A. A copy of this Petition has been sent to the Regional Board. A copy of the Request to Prepare Record of Proceeding is attached as Exhibit B. The issues and a summary of the bases for the Petition follow. Petitioner reserves the right to file a more detailed memorandum in support of its Petition when the full administrative record is available and any other material has been submitted.[1]

The District takes pride in the fact that it has a long history of working cooperatively with the Regional Board to achieve the common goal of protecting water quality in Suisun Bay. The District and the Regional Board continued this history of cooperation during the development of this Permit, and the District commends the Regional Board for addressing many complex technical and legal issues in a professional and conscientious way. On three issues, however, the Regional Board's legal analysis is incorrect. With great respect for the Regional Board and its staff, the District must seek review of these issues from the State Board in order to preserve the District's rights. The District hopes that the issues raised in this petition will not have to be litigated, but the cost of complying with the contested Permit provisions is staggering. The District requests that the State Board initially hold this petition in abeyance pursuant to Title 23, California Code of Regulations, section 2050.5, subdivision (d), to allow time for the District to attempt to resolve its concerns with the Regional Board informally.

The District requests that the State Board review three issues in its Permit. First, the Regional Board incorrectly interpreted the Clean Water Act's anti-backsliding provisions in refusing to relax the District's effluent limitations for copper. The development of a new water effects ratio (WER)

[1] The State Water Resources Control Board's regulations require submission of a statement of points and authorities in support of a petition (23 C.C.R. §2050(a)(7)), and this document is intended to serve as a preliminary memorandum. However, it is impossible to prepare a complete statement and memorandum in the absence of the complete administrative record, which is not yet available.

for copper should have resulted in less stringent effluent limitations. The Regional Board misinterpreted the Clean Water Act and precedential State Board decisions that allow relaxation of the copper effluent limitations and inappropriately imposed overly stringent effluent limitations. Second, the Regional Board incorrectly interpreted the narrative bioaccumulation objective when analyzing reasonable potential for dioxin TEQ and when calculating final effluent limitations for dioxin TEQ. The bioaccumulation objective prohibits controllable factors from causing bioaccumulation of toxic substances, but the Regional Board analyzed reasonable potential and calculated the final limits without regard to controllability. Even if dioxin discharges may be controlled to some extent by some sources, the bioaccumulation objective does not require the imposition of effluent limitations that go beyond what is reasonably controllable.

Third, the Regional Board improperly included final effluent limitations for mercury in the Permit based on water quality objective the Regional Board admits is outdated and invalid. The Districts hopes this issue will become moot. The Regional Board has stated its intention to adopt a TMDL for mercury that would address the District's concerns before the final effluent limitations take effect. Nevertheless, in order to preserve its rights to challenge these improper, inappropriate and overly stringent effluent limitations, the District has asked that the State Board review them in this petition.

1. **NAME AND ADDRESS OF PETITIONER:**

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2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

The District seeks review of the Regional Board's issuance of the Permit. The specific permit requirements which the State Board is requested to review relate to the following:

A. The imposition and derivation of overly stringent effluent limitations for copper.

B. The imposition and derivation of overly stringent effluent limitations for dioxin TEQ based on an incorrect interpretation of the narrative bioaccumulation objective.

C. The imposition and derivation of overly stringent effluent limitations for mercury.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT:

The Regional Board adopted the Permit on January 23, 2007.

4. STATEMENT OF REASONS THE REGIONAL BOARD'S ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER

A. The Regional Board Misinterpreted Anti-Backsliding Rules and Improperly and Inappropriately Imposed Overly Stringent Effluent Limitations for Copper

The Permit improperly and inappropriately retains the final effluent copper limits from the District's 2001 NPDES permit. The Regional Board acknowledges that recent scientific information would justify less stringent effluent limitations for copper. (Fact Sheet, pp. F-26 – F-27.) The more stringent effluent limitations from the District's 2001 permit were imposed solely because of the Regional Board's interpretation of anti-backsliding rules. (*Id.* at p. F-27.) The Regional Board's anti-backsliding analysis is incorrect because it fails to apply appropriate exceptions applicable where new information justifies less stringent effluent limitations. (33 U.S.C. §§ 1342(o), 1313(d)(4).)

1. The prior permit and subsequent new information

At the time final limits for copper were included in the District's 2001 NPDES permit, Suisun Bay was on the 303(d) list for copper, and the Regional Board did not have final information to support a WER for the San Francisco Bay north of the Dumbarton Bridge. The Regional Board was, however, in the process of developing a site-specific water quality objective (SSO) for copper in the San Francisco Bay. The District's 2001 permit specifically noted the SSO and its potential to alter future effluent limitations for copper: "These permit holders [including the District] in conjunction with the [Regional] Board and through the San Francisco Estuary Institute are gathering data towards the delisting [of copper]. In addition, the information gathered might lead to a site-specific objective for copper, which might alter the [District's] future effluent limitation for copper." (District's 2001 permit, pp. 10-11.)

The information gathered for the copper SSO development effort led to the determination of an applicable WER of 2.4. (Fact Sheet, p. F-26.) The Regional Board then used this WER as a basis for removing copper from 303(d) list for San Francisco Bay in December 2004. (Compare 1998 303(d) list for the San Francisco Bay Regional Board, p. 13, with the 2006 303(d) list, pp. 65-66.) The SSO development effort also led to a consensus that site-specific translators for copper of 0.38 (chronic) and 0.67 (acute) are the correct values for San Francisco Bay north of Dumbarton Bridge. (Fact Sheet, p. F-26.)

2. It is undisputed that current information justifies less stringent effluent limitations for copper

The Regional Board concedes in the District's Permit that the effluent limitations for copper would be less stringent based on current scientific information. The Permit includes the following table that illustrates the discrepancy between the copper effluent limitations from the prior permit and the effluent limitations that are appropriate in light of new information.

Table F-10. Calculation of Effluent Limitations for Copper

Effluent Limitations for Copper		
	AMEL	**MDEL**
Previous Permit	14 µg/L	20 µg/L
Based on CTR Criteria	105 µg/L	150 µg/L
Based on Site Specific Objectives	83 µg/L	118 µg/L

In response to the District's comments, the Regional Board stated that "We acknowledge that the limits in the permit are more stringent than those that would apply based on current Water Effects Rations (WERs) and translator values. The Fact Sheet provides the calculations that show the less stringent effluent limits, shown above, that could be used in the absence of anti-backsliding constraints." (Regional Board's Response to Written Comments, p. 2.)

3. Anti-backsliding provisions do not prevent the Regional Board from including correctly-calculated effluent limitations for copper in the District's permit

The Regional Board's interpretation of the Clean Water Act's anti-backsliding provisions is incorrect; it is inconsistent with the language of the Clean Water Act, EPA guidance and the State Board's precedential orders. In its response to comments, Regional Board staff stated that the District is not entitled to an anti-backsliding exception on the basis of new information. (Regional Board's Response to Written Comments, p. 2.) Staff acknowledged that new information can justify backsliding under 33 U.S.C. § 1342(o)(2), but asserted that there is a condition to this exception limiting its application to situations where other actions decrease pollutant discharges. (*Ibid.*) Regional Board staff concluded that the District is not entitled to the anti-backsliding exception because the Regional Board believes "there are no proposed actions to decrease discharges of copper . . ." (*Ibid.*)

Regional Board staff's interpretation of the anti-backsliding rule is incorrect for several reasons. First, the Regional Board has inappropriately focused only on the anti-backsliding exceptions in 33 U.S.C. § 1342(o)(2). "Both paragraphs 402(o)(1) and (o)(2) contain exceptions that apply to the relaxation of water quality based permit limits." (September 1989 Memorandum from James R. Elder (US EPA) "Interim Guidance on Implementation of Section 402(o) Anti-backsliding Rules for Water Quality-Based Permits" [the "EPA Interim Guidance"], p. 4.) Effluent limitations under 33 U.S.C. § 1342(o)(1) may be relaxed if the requirements of 33 U.S.C. § 1313(d)(4) are met. "EPA has consistently interpreted Section 402(o) to allow relaxation of effluent limitations if either of the requirements of Section 303(d)(4) or 402(o)(2) is met. They contain independent exceptions to the prohibition." (*In the Matter of Review on its Own Motion of Waste Discharge Requirements for*

the Avon Refinery, et al. [Tosco], State Water Resources Control Board, Order WQ 2001-06, p. *25.) "[U]nder paragraph (o)(1) [of Section 402] exceptions, mistakes or new information may justify the relaxation of water quality-based effluent limitations where the § 303(d)(4) requirements are met." (EPA Interim Guidance, p. 7; see also Anti-backsliding Flowchart, Attachment 2 to EPA Interim Guidance).

The 33 U.S.C. § 1342(o)(1) exceptions to the anti-backsliding rule are not subject to the condition requiring other actions to decrease pollutant discharges. "Although new information is being relied on to request the permit modification, paragraph (o)(2) will not justify the requested modification unless the State reduces the pollutant loadings from other point sources or non-point sources of pollution. . . . [¶] The paragraph (o)(1) exceptions, on the other hand, may justify this requested relaxation." (EPA Interim Guidance, Attachment 1, Example 1.)

The copper effluent limitations in the District's permit should be relaxed under 33 U.S.C. §§ 1342(o)(1) and 1313 (d)(4)(B). There are different requirements in 33 U.S.C. §1313(d)(4) for revising effluent limitations depending upon whether the applicable water quality standard is being attained or not. For waters where the standard is attained, the applicable requirements are in 33 U.S.C. § 1313(d)(4)(B). These are the requirements applicable to the copper limits in the District's permit because Suisun Bay is no longer 303(d)-listed for copper. In relevant part, 33 U.S.C. § 1313(d)(4)(B) provides that "any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." "Note that § 303(d)(4)(B) is broader than § 303(d)(4)(A), in that (B) allows for the relaxation of permit limitations based on a § 303 TMDL/WLA, any water quality standard established under § 303, or any other permit standard, whereas (A) only allows for the relaxation of permit imitations based on a § 303 TMDL/WLA." (EPA Interim Guidance, p. 4, fn. 9.)

Thus, under the 33 U.S.C. §§ 1342(o)(1) and 1313(d)(4)(B) exceptions to the anti-backsliding rule, the existence of new information can justify relaxed permit limits as long as there is no violation of the antidegradation policy. The District cannot discern how allowing copper effluent limitations

calculated based on the current Water Effects Ratio and translator values would be inconsistent with the antidegradation policy, and Regional Board staff has not made any statement to the contrary. Indeed, the District presumes that the Regional Board would not be using the current WER and translator values to develop effluent limitations for other similarly situated dischargers if that would violate the antidegradation policy. The District's effluent limitations for copper should be relaxed based on the authority of U.S.C. §§ 1342(o)(1) and 1313(d)(4)(B).

Moreover, even under 33 U.S.C. § 1342(o)(2), the less stringent copper limits are justified because there have been and will be actions to decrease discharges of copper. The District has implemented an aggressive pretreatment program that has historically achieved a dramatic reduction in copper discharges. The District will continue to implement this program, and copper remains a top priority in the District's Pollution Prevention Plan. Also, the Regional Board's increased regulation of urban runoff through storm water regulation and TMDLs will significantly reduce the amount of copper discharged into Suisun Bay. In finding that South Bay dischargers were entitled to an anti-backsliding exception for copper, the State Board noted that, "effluent concentrations have decreased substantially." (*Own Motion Review of the Petition of Communities for a Better Environment and San Francisco Baykeeper and Clean South Bay*, State Water Resources Control Board (SWRCB) Order WQ 99-09, p. *7.) The same is true for the District, and so the District is also entitled to an anti-backsliding exception.

Indeed, the Regional Board's interpretation is impossible to reconcile with the State Board's decision in WQ 99-09. In that proceeding, the State Board considered environmental groups' claim that effluent limitations for copper and other metals violated anti-backsliding rules.

> [T]he board concludes that this case falls under an exception to the anti-backsliding rule. Water quality-based limits may be relaxed in a later permit based on new information. This exception applies if the information was not available when the prior permit was issued and if it would have justified less stringent effluent limitations. When the Regional Water Board reissued the South Bay permits, the Regional Water Board had new information on appropriate water-effect ratio for copper, translators for both copper and nickel and the acute-

to-chronic ratio for nickel. This new information would have justified less stringent limits in 1993.

(*Id.* at p. *7.)

The facts and circumstances of the District's Permit are nearly identical to those presented in WQ 99-09, and therefore the result should be the same. The State Board did not analyze whether there were additional actions to reduce copper in WQ 99-09 or require the dischargers to make a showing on that point, and presumably there would not have been greater copper reductions in the South Bay than those in Suisun Bay.

The District has been able to comply with the copper final limits for the past five years. However, the District is concerned that under drought conditions, the concentration of copper may increase with reduced water use to the extent that compliance with the final effluent concentration limits would be jeopardized. Most other dischargers have, or will have, final limits that are less stringent but are based on sound scientific data. The District has identified copper as one of its top priorities in its 2007 Pollution Prevention Plan and will continue to focus efforts and resources on reducing sources of copper into the treatment plant.

Nevertheless, the final copper limits should be corrected to reflect the most current scientific information and to implement exceptions to the anti-backsliding policy that were developed to address situations like this one. The Permit should be remanded to the Regional Board with directions to make the revisions suggested by the 2001 NPDES permit language—revisions the District was led to believe would occur. The Regional Board should be directed on remand to revise the final effluent limitations for copper to be 105 and 150 µg/L monthly average and daily maximum, respectively, based on the use of the WER value of 2.4 and the translator values developed for San Pablo Bay in the Clean Estuary Partnership document titled *North of Dumbarton Bridge Copper and Nickel Development and Selection of Final Translators* (2005).

For the reasons stated above, the overly stringent effluent limitations for copper in the Permit are inappropriate, improper and illegal. The Regional Board has not made sufficient findings, and the effluent limitations are not supported by the evidence.

B. The Effluent Limitations for Dioxin TEQ Are Illegal Because They Are More Stringent Than The Narrative Bioaccumulation Objective

In the District's 2001 NPDES permit, the Regional Board included an interim mass limit for dioxin (0.836 mg/month). (District's 2001 permit, p. 20.) The mass limit is calculated as 2,3,7,8-TCDD TEQ. (*Ibid.*) The District appealed the 2001 permit based on the inclusion of the dioxin mass limit, and the appeal was held and remains in abeyance. The current Permit extends the interim dioxin mass limit until June 2011 and also imposes a dioxin concentration final effluent limit of 0.014 pg/L, expressed as 2,3,7,8-TCDD TEQ. (Permit, pp. 11 (Table 7), 15, 22-23.) The issues regarding the dioxin mass limits in the prior appeal have not been resolved, and the addition of final effluent concentration limits has further increased District's concerns.

According to the Permit, the concentration final effluent limit is based on a translation of the Basin Plan narrative bioaccumulation objective into a numeric objective expressed in 2,3,7,8–TCDD equivalents (or dioxin TEQ) based on the CTR criterion for 2,3,7,8–TCDD and the application of the toxic equivalence factors (TEFs) for dioxins and furans adopted by the World Health Organization in 1998.

The primary source of dioxin is air emissions, and the District does not have any means to control these sources. In fact, the District's 2001 NPDES permit states the following, "The Board recognizes that the primary source of dioxins and furans in the Bay Area is air emissions from combustion sources. Dioxins and furans in wastewater are mainly attributed to domestic waste and storm runoff, especially the latter that entrains these pollutants as a result of air deposition. The root cause of dioxin detected is beyond the [District's] control." (District's 2001 permit, pp. 9-10.) The Fact Sheet of the 2007 Permit contains a similar acknowledgement on page F-31. The Regional Board stipulates that "the main source of dioxins and furans in the domestic waste stream is beyond the [District's] control." (Fact Sheet, p. F-31.)

1. Regulation of dioxin TEQ under the bioaccumulation objective is limited to controllable factors

The 2,3,7,8-TCDD TEQ effluent limitations in the District's permit are improper and inappropriate interpretations of the narrative bioaccumulation objective. That objective provides that

"*Controllable* water quality factors shall not cause a detrimental increase in concentrations of toxic substances found in bottom sediments or aquatic life." (Basin Plan, § 3.3.2 (emphasis added).) The introduction to the water quality objectives chapter of the Basin Plan explains that:

> When uncontrollable water quality factors result in the degradation of water quality beyond the levels or limits established herein as water quality objectives, *the Regional Board will conduct a case-by-case analysis of the benefits and costs of preventing further degradation.* In cases where this analysis indicates that beneficial uses will be adversely impacted by allowing further degradation, then the Regional Board will not allow controllable water quality factors to cause any further degradation of water quality. Controllable water quality factors are those actions, conditions, or circumstances resulting from human activities that may influence the quality of the waters of the state and *that may be reasonably controlled.*

(Basin Plan, § 3.1 (emphasis added).)

Because the water quality objective regulates only controllable water quality factors, and controllable water quality factors are defined to include only human activities that may be reasonably controlled, the Regional Board must consider only controllable factors both in its reasonable potential analysis and in calculating effluent limitations.

The Regional Board concedes that "the main source of dioxins and furans in the domestic waste stream is beyond the Discharger's control as it already operates a well-maintained secondary treatment plant (100% compliance past five years). Because of this, dioxins and furans concentrations cannot be further reduced without significant upgrades to the facility to advanced treatment which could be overly burdensome and would not be cost effective for the benefits received." (Fact Sheet, p. F-31). Thus, the Regional Board concedes that dioxin in the District's effluent comes from human activities that may not be "reasonably controlled."

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2. The State Board's decision in WQ 2002-0012 does not control this petition because the District's contention is that the overly stringent effluent limitations regulate uncontrollable water quality factors, not that dioxin pollution in general cannot be controlled even in part

The State Board previously considered whether dioxin is appropriately regulated under the Basin Plan's narrative bioaccumulation objective in *In the Matter of the Petitions of East Bay Municipal Utility District and Bay Area Clean Water Agencies*, State Water Resources Control Board, Order WQO 2002-0012. That decision does not resolve the District's petition because it addressed a different contention.

In WQO 2002-0012, the discharger relied on permit findings regarding the difficulty of further limiting the discharge of dioxin to argue that "discharges of these substances are not 'controllable,' and therefore are not subject to the [narrative bioaccumulation] water quality objective." (*Id.* at p. *3.) Reading the permit findings "as a whole," the State Board found the Regional Board's statements to be a determination "that the current technology of POTWs is controlling the discharges *in part*." (*Ibid.* (emphasis added).) The State Board opined that the "controllable" requirement distinguishes "between unidentifiable background sources and identifiable point and non-point sources associated with human activities that can be controlled, albeit perhaps at significant expense." (*Ibid.*) Accordingly, the discharger's blanket claim that dioxin discharges cannot be regulated under the narrative bioaccumulation objective was rejected. (*Ibid.*)

This District is not arguing in this petition, as the discharger in WQO 2002-0012 did, that dioxin cannot be regulated *at all* under the narrative bioaccumulation objective. If the 2,3,7,8-TCDD TEQ effluent limitations in the District's permit were at a level of stringency that matched the level of water quality control provided by "the current technology of POTWs" and pretreatment source control programs, these dioxin congeners could arguably be regulated under the narrative bioaccumulation objective. But the 0.014 pg/L 2,3,7,8-TCDD TEQ effluent limitation in the District's permit goes far beyond that level of pollution control. The bioaccumulation objective may be interpreted to require removal of amounts of dioxin that may be reasonably controlled, but it cannot be interpreted to impose effluent limits more stringent than that. The fact that POTWs may

reduce dioxin discharges "in part" cannot bring effluent limitations of unlimited stringency within the penumbra of a water quality objective that is explicitly limited to "controllable water quality factors." Indeed, WQO 2002-0012 implicitly acknowledges that dioxin discharges "in part" are *not* controllable. Dischargers may not be required to remove the uncontrollable 2,3,7,8-TCDD TEQ "part" from their effluent under the narrative bioaccumulation objective.

To the extent that the State Board's analysis in WQO 2002-0012 addresses incremental regulation of dioxin under the bioaccumulation objective, it is dicta and it fails to consider the specific provisions of the Basin Plan. The State Board's interpretation of "controllable" as a reference to whether a water quality factor is "identifiable" is not a proper construction of the Basin Plan. As a preliminary matter, "controllable" and "identifiable" simply do not have the same meaning. (Compare The American Heritage Dictionary of the English Language, Fourth Edition. Retrieved February 19, 2007, from Dictionary.com website: http://dictionary.reference.com/browse/controllable ("controllable . . . 2. To adjust to a requirement; regulate: *controlled trading on the stock market; controls the flow of water.*"); http://dictionary.reference.com/browse/identifiable ("identifiable . . . 2. To ascertain the origin, nature, or definitive characteristics of.").) By way of analogy, inclement weather is easily identifiable, but it certainly is not controllable. Interpreting the Basin Plan to substitute the word "identifiable" for "controllable" impermissibly changes the meaning of the regulation.

The State Board's use of "controllable" and "identifiable" as synonymous terms is further undercut by the actual definition of "controllable water quality factors" in the basin plan as "those actions, conditions, or circumstances resulting from human activities that may influence the quality of the waters of the state and *that may be reasonably controlled.*" (Basin Plan, § 3.1 (emphasis added).) The Regional Board has admitted that the main source of dioxin in the District's influent is "beyond the [District's] control" and that compliance with the 2,3,7,8-TCDD TEQ effluent limitations "could be overly burdensome and would not be cost effective for the benefits received." (Fact Sheet, p. F-31.) To allow overly burdensome regulation that is not cost effective to be imposed under the narrative bioaccumulation objective is to render "that may be reasonable controlled" surplussage.

In addition, under the provisions of the Basin Plan, uncontrollable water quality factors can only be regulated after the Regional Board has conducted a "case-by-case analysis of the benefits and costs of preventing further degradation." No such analysis has been conducted for 2,3,7,8-TCDD TEQ. Uncontrollable discharges of 2,3,7,8-TCDD TEQ cannot be regulated until the study has been completed. The Regional Board's responses to comments on this point rest solely on the fiction that all dioxin discharges are "controllable." Just because dioxin can be controlled to some degree does not make all discharges of dioxin "controllable."

The Regional Board also argued in its responses to comments that EPA's action in placing San Francisco Bay on the 303(d) list as impaired by dioxin resolves the issue of whether the effluent limitations in the District's permit regulate "controllable water quality factors." EPA's 303(d) listing means only that implementation of technology-based effluent limitations required under 33 U.S.C. § 1311(b)(1)(A) and 33 U.S.C. § 1311(b)(1)(B) will not be sufficient to implement the bioaccumulation objective. (33 U.S.C. § 1313(d)(1)(A).) Since "[t]he Regional Water Board recognizes that the primary source of dioxins and furans in the Bay Areas is air emissions from combustion sources" (Fact Sheet, p. F-31), EPA's 303(d) listing more than anything signals that air emissions that can reasonably be controlled are causing bioaccumulation of dioxin. The only source of dioxin compounds mentioned on the 303(d) list itself is "Atmospheric Deposition." In fact, EPA's web site indicates that the agency believes only 2% of the dioxin in San Francisco Bay comes from POTWs. (<http://www.epa.gov/docs/region09/water/dioxin/sfbay.html> [as of February 20, 2007].) The 303(d) listing says nothing about whether actions the District will have to take to comply with the effluent limitations in its Permit are "controllable water quality factors."

3. The Regional Board's reasonable potential analysis ignored the fact that the narrative bioaccumulation objective only regulates controllable water quality factors

The Regional Board's reasonable potential analysis ignores the actual language of the bioaccumulation objective. There is no reasonable potential for the District's discharge to cause or contribute to an excursion above the narrative bioaccumulation objective because it only prohibits

detrimental increases in concentration caused by *controllable* water quality factors. The Regional Board's extrapolation from the CTR criterion for 2, 3, 7, 8-TCDD is flawed because the CTR criteria are based only on a risk assessment. (See 65 Fed. Reg. 31682-01 (May 18, 2000).) In determining whether the District's discharge has the reasonable potential to cause an excursion above the bioaccumulation standard, the Regional Board should have considered whether dioxin TEQ in the District's discharge "that may reasonably be controlled" was contributing to bioaccumulation of toxic substances. By conducting a purely risk-based reasonable potential analysis, without regard to controllability, the Regional Board staff inappropriately ignored the actual text of the water quality objective it purported to analyze.

4. The Regional Board calculated effluent limitations for 2,3,7,8-TCDD that are more stringent than required to implement the bioaccumulation objective

In addition, even if the Regional Board could properly find reasonable potential for dioxin TEQ, it is an improper implementation of the bioaccumulation objective to require removal of dioxin caused by uncontrollable factors. By reading "controllable water quality factors" out of the bioaccumulation objective, the Regional Board is establishing a new water quality objective. As the State Board explained in *In the Matter of the Petition of City and County of San Francisco, et al.*, State Water Resources Control Board, WQ 95-4 (September 21, 1995):

> A RWQCB may choose, on a case-by-case basis, however, to establish water quality-based effluent limitations which are more stringent than limitations based upon the applicable water quality objectives where necessary to protect beneficial uses or prevent nuisance. If a RWQCB takes this approach, the rationale for the more stringent limitations must be explained in the permit findings, which must be supported by evidence in the record. In addition, the RWQCB must consider the factors specified in Water Code Section 13241, which apply to the adoption of water quality objectives on a permit-specific basis.

(*Id.* at p. *5 (citations and footnotes omitted); see also *In the Matter of the Petition of the Cities of Palo Alto, et al.*, State Water Resources Control Board, WQ 94-8 (September 22, 1994), p. *3;

Southern California Edison Co. v. State Water Resources Control Board (1981) 116 Cal.App.3d 751, 759-61.) The Regional Board acted improperly, inappropriately and illegally because it did not analyze the factors listed in section 13241 when imposing the effluent limitations for 2,3,7,8-TCDD in the District's permit and it did not make findings explaining why it is necessary to impose effluent limitations more stringent than required by the bioaccumulation objective.

By imposing effluent limitations for 2,3,7,8-TCDD that are more stringent than required by the narrative bioaccumulation objective, the Regional Board imposed effluent limits that are more stringent than required by federal law. The Regional Board has identified the narrative bioaccumulation objective as the "applicable water quality standard" relevant to the effluent limitations for 2,3,7,8-TCDD in the District's Permit. (Fact Sheet, p. F-30.) As explained above, because the effluent limitations require the District to remove 2,3,7,8-TCDD that does not come from controllable water quality factors, the effluent limitation are more stringent than the narrative bioaccumulation objective, and therefore more stringent than federal law. When imposing effluent limitations that are more stringent than federal law, the Regional Board must consider the factors listed in Water Code section 13241. (*Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 625-27.) If the economic impact of the effluent limitations would be severe, the limitations must be made less stringent (*Burbank, supra,* 35 Cal.4th at p. 626 fn. 7 ["State law, as we have said, allows a regional board to consider a permit holder's compliance cost to relax pollutant concentrations, as measured by numeric standards, for pollutants in a wastewater discharge permit."].)

Based on these concerns, the Permit should be remanded back to the Regional Board with direction to either eliminate the 2,3,7,8-TCDD TEQ mass and concentration limits from the permit, or to analyze whether there is reasonable potential for 2,3,7,8-TCDD TEQ in light of the actual language of the bioaccumulation objective. The Regional Board should further be directed to, if it finds reasonable potential for 2,3,7,8-TCDD TEQ, conduct the cost/benefit analysis required by the Basin Plan, then calculate effluent limitations based on the actual language of the bioaccumulation objective or conduct the analysis required under Water Code sections 13263 and 13241 if it decides to adopt effluent limitations that are more stringent than the Basin Plan and federal law.

For the reasons stated above, the final effluent limitations for 2,3,7,8-TCDD TEQ in the District's permit are inappropriate and invalid. The Regional Board has not made sufficient findings, and the Permit is not supported by the evidence.

C. The Regional Board Inappropriately and Improperly Imposed Overly Stringent Final Effluent Limitations for Mercury Based on a Water Quality Objective the Regional Board Admits is Invalid

The District understands and expects that the Regional Board will adopt a TMDL for mercury before the final effluent limitations for that chemical become effective on April 29, 2010. If the TMDL is adopted and approved on time, the District's concerns regarding the final limits will become moot. Nevertheless, in order to preserve its right to challenge the final limits for mercury if they take effect, the District petitions the State Board on the ground that the Regional Board inappropriately and improperly included final effluent mercury limits of 0.018 and 0.046 µg/L monthly average and daily maximum, respectively, based on an outdated EPA water quality objective that has been in the Basin Plan since 1986. EPA effectively abandoned the 0.025 µg/L objective in 2000, with the adoption of a saltwater human health criterion of 0.051 µg/L for South San Francisco Bay and the rest of California. The objective remains in the Basin Plan even though the Regional Board staff, Dr. Tom Mumley, stated, "The Water Board is also replacing the outdated water quality objectives for mercury…" (The Pulse of the Estuary 2006 Report, page 7).

The impact of the final effluent limitations for mercury on the District would be severe. Preliminary estimates of the cost to comply with the proposed final limits range from $16 million to $53 million. The Regional Board does not dispute these facts. "We agree that complying with the final limit could be difficult and costly." (Regional Board's Response to Written Comments, p. 3.)

It was inappropriate and improper for the Regional Board to use the Basin Plan objective, with its scientific limitations, to develop final effluent limits. The Regional Board has essentially conceded that the outdated water quality objective for mercury is invalid. Because the objective is not necessary to protect beneficial uses, it is no longer meets the criterion for necessity under Government Code section 11353, subdivision (b)(2)(C). Since the Regional Board has admitted that

the mercury objective is outdated, it has admitted it could not demonstrate the necessity of the objective as it would be required to do in order to show the validity of a basin plan amendment under the Government Code. Because the objective is no longer valid, it should not continue to be imposed on the District. Furthermore, the Regional Board had a duty to modify the mercury objective during its triennial reviews subsequent to EPA's abandonment of the overly stringent 0.025 µg/L objective in 2000. (33 U.S.C. § 1313(c)(1) (state must hold hearings at least every three years "for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.")) It is inappropriate and improper, not to mention unfair and illegal, for the Regional Board to continue enforcing this invalid objective against the District. (*Huntley v. Public Utilities Comm'n* (1968) 69 Cal.2d 67, 76.) The District should not be punished for the Regional Board's failure to address this issue in a timely manner.

For the reasons stated above the Permit should be remanded to the Regional Board with directions to remove the inappropriate and improper overly stringent effluent limitations for mercury.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED

The District is aggrieved as a permit holder subject to conditions and limitations which may be more stringent or onerous than required or provided for under current law. Accordingly, the District will be required to expend portions of its limited assets to comply within inappropriate or unlawful permit conditions for copper, 2,3,7,8-TCDD TEQ and mercury. Given that the District's resources are limited, it is aggrieved when it is forced to use resources to accomplish ends which are unnecessary and/or not required by law. This aggrievment is exacerbated when, in its judgment, these additional efforts are not likely to provide for measurable betterment to the water quality of its receiving waters. The District is also aggrieved because it will be exposed to greater jeopardy for non-compliance and an increased exposure to third party lawsuits.

Through the imposition of effluent limitations for 2,3,7,8-TCDD TEQ and mercury, the District will be potentially exposed to duplicate mandatory penalties for the same constituent under SB709 and increased discretionary penalties. Inclusion of these limits may also require the District to investigate or undertake mass offset programs that will siphon off resources that could be more

appropriately used for improving water quality in other ways. Ultimately, the imposition of effluent limitations for 2,3,7,8-TCDD TEQ and mercury may impact on the District's ability to serve new development and an increased population due to densification and infill growth.

Furthermore, the District is aggrieved by the imposition of final effluent limitations for 2,3,7,8-TCDD TEQ and mercury because the Regional Board may refuse to relax those effluent limitations in the future, even where technically and legally justified, based on incorrect anti-backsliding analysis.

The District is aggrieved the imposition of overly stringent effluent limitations for copper because, even though the District can currently comply with the limits, it is concerned that drought conditions or other foreseeable circumstances may result in noncompliance. The District is also aggrieved by the copper limitations because during the last permit term, the Regional Board was led to believe that if the District supported the development of an SSO, it would be able to realize the benefit of that development effort in the form of relaxed effluent limitations for copper in the next permit. The District committed resources to the development of the SSO in reliance on the Regional Board's representation, and it is aggrieved by the Regional Board's action in withholding the benefits that should accrue to the District from that investment.

The District is aggrieved by the inclusion of each of the unlawful or excessive permit conditions which it cannot now or in the future comply with because it will be subject to mandatory minimum penalty provisions under Water Code § 13385. With this statute, the Regional Board has little or no discretion to excuse non-compliance, regardless of whether the permit condition may have been initially improperly imposed. In addition, other enforcement provisions and penalties are provided for under federal law and managers of treatment plants may be subject to criminal liability based on negligent permit violations. In short, the potential legal exposure for violations is horrendous and thus even minimal permit errors give rise to great additional risk to the permittee.

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6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD REQUESTED

The District seeks an Order by the State Board that will remand the Permit to the Regional Board with direction for revisions as follows:

A. Relax the District's effluent limitations for copper based on anti-backsliding exceptions for new information.

B. Delete the effluent limitations for 2,3,7,8-TCDD TEQ, or reconsider them in light of the limitation of the bioaccumulation objective to controllable water quality factors, and in light of the requirements of the Basin Plan and Water Code sections 13263 and 13241.

C. Delete the final effluent limitations for mercury.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THIS PETITION

The District's preliminary statement of points and authorities is set forth in Section 4 above. The District reserves the right to supplement this statement upon receipt and review of the administrative record.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD

A true and correct copy of the Petition was mailed by First Class mail on February 22, 2007, to the Regional Board at the following address:

Bruce Wolfe, Executive Officer
California Regional Water Quality Control Board,
San Francisco Region
1515 Clay Street, Suite 1400
Oakland, California 94612

9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD

The substantive issues and objections in this petition were raised before the Regional Board.

10. REQUEST TO HOLD PETITION IN ABEYANCE

The District requests that the State Board hold this petition in abeyance pursuant to Title 23, California Code of Regulations, section 2050.5, subdivision (d), to allow time for the District to attempt to resolve its concerns with the Regional Board informally.

Dated: February 22, 2007

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER & WILSON

By _____
KENTON L. ALM
Attorney for Petitioner
CENTRAL CONTRA COSTA SANITARY DISTRICT

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